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Opinion

August 7, 1957

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CONCORD, N.H.

Mr. Thomas E. Thompson
Assistant Commissioner of Public Welfare
State House Annex
Concord, New Hampshire

Dear Mr. Thompson:

This will serve to supplement my verbal communication with you relative to procedure and adoption proceedings where the birth certificate indicates the offspring is a bastard when in fact the infant was born of duly married parents.

The specific certificate in question indicates the child was born January 25, 1957. The birth certificate does not disclose the name of the father, although the other public records of The State of New Hampshire indicate that the mother was married to Mr. Gagnon and there is no record of a divorce of said parents. In fact, as I understand from you, the mother readily admits that she is married to Mr. Gagnon presently and was for a number of years prior to the birth of the child. The further factual pattern shows that the certificate gives the child's surname as that of the maiden name of the mother.

The question simply stated is: Where two public records are in conflict with one another, what procedure should be used in the Probate Court when petition is filed for adoption. In other words, should the petition be that for the adoption of an illegitimate child or a petition for the adoption of a legitimate child.

The procedure obviously is different in each instance since if it were an illegitimate child, only the mother would have to release the child for adoption. If it is a legitimate child, both the husband and wife would have to release the child for adoption. It is my understanding that a substantial amount of the other States of the Union use a different birth certificate than that adopted in New Hampshire. Those certificates indicate the husband's and wife's name if the parents are married, rather than requesting the name of the father. Since that is not the method used in this State the following procedure

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should be used: When the father's name does not appear on the birth certificate and in fact the mother is married, then the signature of both husband and wife must appear on the petition irrespective of whether the mother denies her husband's paternity of the child. The reason for this is based upon the strongest presumption in American law which is "that every child born in wedlock is presumed to be legitimate." See 7 Am. Jur., Bastards, s. 14. Our own Legislature has affirmed this common law presumption by adding statutes to implement this principle of law.

"Legitimacy of Offspring. No decree of divorce shall affect the legitimacy of a child born or begotten in lawful matrimony, unless it shall be so expressed in the decree, and children born of a marriage entered into in good faith by the parties thereto shall be regarded as legitimate children and their legitimacy shall not be affected by a decree of nullity, unless it shall be so expressed in the decree." RSA 458:23.

The New Hampshire Legislature has even gone as far as to say:

"Where the parents of children born before marriage afterwards intermarry, and recognize such children as their own, such children shall be legitimate and shall inherit equally with their other children under the statute of distribution." RSA 457:42.

Our Supreme Court of New Hampshire in Town of Cannon v. Avery, 72 N.H. 591, held that all children begotten while their parents are living together as husband and wife are legitimate, and this presumption cannot be refuted by the fact that the wife is guilty of adultery during the period of gestation.

The only method that our law prescribes for rebutting the legitimacy of a child born in wedlock is through court proceedings. See RSA 522:5. The procedures for bastardizing a child are spelled out and the conclusion of experts on certain tests as well as testimony and other evidence is found in RSA 522:5.

Since the infant is armed with this presumption of legitimacy if born of a married mother, then certainly the mere whim of the mother refusing to state the name of the father on the birth certificate does not overcome the legitimacy of the offspring since this only can be done at a court of law. A release for adoption without the husband's approval would cause a constant cloud on the adopting

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parents as to whether they ever received a valid release of the child for adoption. Likewise the Court could not properly adjudicate on the petition for adoption based on the birth certificate since in fact the birth certificate is not complete.

Sincerely yours,

William J. Deachman
Assistant Attorney General

WJD/aml

cc: Honorable Edile Lemelin
Judge of Probate
Hillsborough County
Nashua, New Hampshire